then whether they are liable would also be a triable issue. In view of the conclusions I have arrived at on the matters raised by or on behalf of the first defendant, I hold that there are no triable issues between the plaintiffs and the second, third and fourth defendants as well.

The appeal is allowed with costs. There will be leave for the plaintiff to enter final judgment as prayed in the Order 14 application enclosure (5).

Appeal allowed.

Solicitors: *Skrine & Co; Chooi & Co.; K.H. Koh; Cheong & Koh.*

GOLDEN WHEEL CREDIT SDN. BHD. v. LIM CHIEW PHENG

[O.C.J. (Mustapha Hussain J.) 8 February 1988]

[Seremban – Originating Summons No. 33 of 1983]

Land Law – Chargor defaulted in payment of loan – Foreclosure proceedings – Public auction of land charged – Legal fees of solicitors – Whether legal fees can be paid out of proceeds of sale at public action – Principles applicable – National Land Code 1965, s. 268(1)(b) – Bankruptcy Act 1967, s. 51(2).

Legal Profession – Legal fees of solicitors – Whether can be paid out of proceeds of land sale at public auction.

The defendant charged his land to the plaintiff for a certain loan. The defendant defaulted in payment of the loan and foreclosure proceedings were taken. The land was later sold at a public auction.

The issue before the present court was whether the legal fees of the plaintiff's solicitors can be deducted from the proceeds of the auction sale and be paid to the plaintiff before the proceeds (or the balance of it) were remitted to the Official Assignee.

Held: the legal fees cannot be deducted and there was nothing to stop the plaintiff from proving its claim in bankruptcy, if at all it is provable and payable legally.

Case referred to:

(1) *Re Woods (Bristol) Limited* [1931] 2 Ch. 320 (folld).

ORIGINATING SUMMONS.

J.G. Bernatt for the plaintiff.

J. Mahinder Singh (Assistant Official Assignee) for the Official Assignee.

Cur. Adv. Vult.

Mustapha Hussain J.: The defendant Lim Chiew Pheng @ Lim Keat Peng on 15 January 1982 charged his land G. No. CT 2571 Lot 3053 Town and District of Seremban to the plaintiff for the sum of $150,000. The charge was registered on 19 January 1982. The defendant defaulted payment, notice under Form 16D of the National Land Code was sent, followed by the originating summons for foreclosure. The originating summons was dated 16 February 1983. The sum owing as on 11 February 1983 was $106,864.25.

Then the High Court on 2 February 1985 on the plaintiff's application for foreclosure made the order that the defendant's land be sold by public auction. Subsequently following a summons for direction, the S.A.R. made the order and fixed the time for the auction, including ordering the plaintiff to deposit $1,000 into court for purpose of the auction, and fixing the reserve price of $380,000.

The plaintiff deposited the $1,000 into court on 4 March 1986.

The auction was successful and the land fetched the price of $381,000. The plaintiff by letter dated 5 July 1986 (see enclosure (24)) claimed ten items of all expenses including the loan and interest due to the plaintiff amounting to $169,308.07; also a note on p. 2 of the letter that the plaintiff's solicitors will tax the costs which would be in the region of $4,500. Enclosure (24) shows the full amount of the plaintiff's bill.

On 20 October 1986, from the proceeds of the auction, $141,084.88 was taken out to pay the following:

(1)	$138,595.68	–	sum due to judgment creditor, the plaintiff, as on 26 September 1985
(2)	$ 809.00	–	payment of quit rent
(3)	$ 680.00	–	valuer's report
(4)	$ 1,000.00	–	refund of plaintiff's deposit
	$141,084.68	–	total

Then, there was a balance of $239,916, now in court, which is to be sent to the Official Assignee but pending the claim now made by the plaintiff and its solicitors.

A bill dated 31 October 1986 put up by the plaintiff to its solicitors (see enclosure (38)) states

that the solicitors' bill is for $9,000 and the auction fee is $7,000 totalling $16,000.

The bill of costs, interestingly, included solicitors' costs (No. 53A on p. 5) amounting to $1,499, another solicitors' costs of $3,000 (No. 90 at p. 9) and yet another solicitors' costs (No. 112 at p. 11) for $6,000. There was also an auctioneer's fee of $7,000 (No. 113 at p. 11 of the bill of costs).

The S.A.R. also ordered the plaintiff's solicitors to explain and clarify the $7,000 claimed as auctioneer's fees and also ordered the plaintiff's solicitors to make an application by summons-in-chambers to claim for the solicitors' fees of $9,000.

Then there was a bill of costs taxed by the S.A.R. (enclosure (42)) amounting to $3,344.80, including the auctioneer's fees.

The plaintiff's solicitors then applied by summons-in-chambers (enclosure (47)) claiming $9,000 for the legal fees paid by the plaintiff's bank to its own solicitors. There is a letter from the plaintiff's solicitors to the S.A.R. informing the S.A.R. that the auctioneer's fees had been settled in the bill of costs and stating that the actual sum payable was $18,147.77 being interest and overdue interest. Also in this letter (enclosure (48)) dated 8 April 1987, the learned plaintiff's solicitors asked the S.A.R. to withhold $9,000 (being legal fees) pending determination of the summons-in-chambers (enclosure (47)).

In his submission (enclosure (53)) the plaintiff's solicitors stated: "*The application here is for legal fees of $9,000 and the auctioneer's fees of $7,000* to be paid out of the proceeds of sale before the balance is forwarded to the Official Assignee."

It is not known whether there is a mistake deliberately done, if one is to go through the bill of costs and the plaintiff's solicitors' own letter dated 8 April 1987 (enclosure (48)) which clearly stated that the auctioneer's fee had been paid already. Why this second claim for the auctioneer's fees when it had already been paid and acknowledged by the plaintiff's solicitors themselves?

Now, as regards the legal fees of $9,000. No proof whatsoever was adduced. One would expect a receipt of $9,000 for this particular case to be exhibited in the application to show that the plaintiff had indeed paid this very huge sum of $9,000 to its solicitors for this particular case, though one would not have expected this case to fetch that extremely exorbitant fee.

The issue here for the court to decide is whether the legal fees (assuming the plaintiff had paid to its solicitors) can be deducted from the proceeds of the auction of the bankrupt's property and paid to the plaintiff before the proceeds (or the balance of it) are remitted to the Official Assignee.

Section 268 of the National Land Code is in point. The sale price or the proceeds of the auction shall be applied as described in section 268, in particular subsection (1)(b). Does the lawyer's fee come within the meaning of "expenses incurred in connection with the making and carrying into effect of the order for sale"? This court is of the view that the costs of applying for the originating summons for foreclosure, the auctioneer's fees paid by the plaintiff (or judgment creditor or chargor) are within the meaning of this subsection (1)(a) of section 268 of the National Land Code, but it does not include solicitor's fees.

Section 50 of the Bankruptcy Act (No. 55 of 1967) is also in point. It is quite clear that a creditor (the plaintiff herein) cannot and is not entitled to retain the benefit of the execution or attachment. And section 51(1) of the Bankruptcy Act 1967 states that the court shall deliver such moneys to the Official Assignee but the costs of and incidental to the execution shall be a first charge on such moneys. And subsection (2) of section 51 says "the court shall deduct the costs of and incidental to the execution and pay the balance to the Official Assignee, ..."

The question now is, does the lawyer's fee come within the meaning of the "costs of and incidental to the execution"?

In *Re Woods (Bristol) Limited*[1] it was held that "the costs of execution" did not include solicitors' costs for issuing and serving the writ of *fieri facias*. In that case the court had the occasion of interpreting the first subsection of section 269 of the Companies Act 1929, which is *in pari materia* in import though some of the words may not be the same. There the court held that the solicitors' costs of issuing the writ of *fi. fa.* did not come within the meaning of "costs of the execution".

This court cannot find any reason to differ from that ruling.

Taking an illustration – if the amount of the charge is, say, $20,000 and the chargee engaged a Queen's Counsel from London paying $100,000 as fees, it would be preposterous to include the expenses to be deducted from the proceeds of sale and given to the chargee. This is costs incurred between client and solicitor.

Any way, there are sufficient funds available and there is nothing to stop the plaintiff from proving its claim in bankruptcy, if at all it is provable and payable legally.

The summons-in-chambers is dismissed. The balance of the proceeds shall now be transmitted to the Official Assignee.

Order accordingly.

Solicitors: *Bernatt Pereira & Co.*

MELVIN LEE CAMPBELL v. AMY ANAK EDWARD SUMEK

[O.C.J. (Tan Chiaw Thong J.) 12 March 1988]

[Kuching – Divorce Petition No. KG 19 of 1987]

Family Law – Divorce – Joint petition – Domicile of husband – Domicile of choice – Whether domicile of choice is Malaysia – Whether court has jurisdiction to entertain petition – Law Reform (Marriage and Divorce) Act 1976, s. 48.

In this case, a joint petition for divorce was made. According to section 48(1) of the Law Reform (Marriage and Divorce) Act 1976, a court can grant a decree of divorce only if both parties were domiciled in Malaysia. The issue before the present court was whether the husband petitioner was domiciled in Malaysia at the time of presentation of the petition.

Held: (1) there are two essential elements involved in determining the domicile of choice and these are the factors of residence and the requisite intention to reside permanently for an indeterminate period in the country where it is alleged that the petitioner has adopted the domicile of choice;

(2) the provision of section 48(1)(c) requires that the court must be satisfied that at the time when the petition was presented the domicile of both the petitioners was in Malaysia;

(3) taking into consideration all factors both in favour and against the husband petitioner in the light of all relevant circumstances, and giving due consideration to his assertion that he intended to make Malaysia his permanent home and also bearing in mind that the burden of proving the abandonment of his domicile of origin and the acquisition of a domicile of choice in Malaysia falls squarely on the husband petitioner, the husband petitioner had not succeeded in showing that at the time of the presentation of the joint petition his domicile was in Malaysia;

(4) therefore, the court has no jurisdiction to entertain the joint petition.

Case referred to:

(1) *Winans & Anor.* v. *Attorney-General* [1904] A.C. 287 (cited).

DIVORCE PETITION.

Richard Poh for the petitioners.

Abdul Razak bin Hj. Mohd. Tready (Acting Deputy State Attorney-General) as *amicus curiae.*

Cur. Adv. Vult.

Tan Thiaw Chong J.: The matter which calls for determination by this court at this hearing relates to the domicile of the husband petitioner at the time when the joint petition for divorce by mutual consent was presented under section 52 of the Law Reform (Marriage and Divorce) Act 1976.

Section 48(1) of the 1976 Act provides, *inter alia,* that nothing in that Act shall authorize the court to make any decree of divorce except "(c) where the domicile of the parties to the marriage at the time when the petition is presented is in Malaysia". There is no question about the wife petitioner at the material time being domiciled in Malaysia. The provision of section 48(1)(c) in my view requires that the court must be satisfied that at the time when the petition in the instant case was presented, the domicile of both the petitioners was in Malaysia. It is true that in the instant petition itself, the husband petitioner asserts that at the time of the presentation of the petition he was domiciled in Malaysia, and this is supported and reiterated in his affidavit sworn on 13 July 1987. In this instance, I would observe that the evidence of the husband petitioner states that he was, and is, an agnostic, but his affidavit was sworn and not affirmed. However that may be, this is of no consequence, in my view, as regards the domicile of the husband petitioner. I do not take this factor in any way as operating against the husband petitioner.

As rightly pointed out by learned counsel who appeared for the State Attorney-General as *amicus curiae* – and this is not a matter at issue – the onus of proving that the husband petitioner at